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Supreme Court, U.S.
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No. A-382

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WALLACE WOOTEN,

Petitioner,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are "loss of society" damages awarded under *Moragne v. United States Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), based upon the unseaworthiness of a vessel, covered by a policy of homeowner's insurance which excludes liability for damages arising out of the operation, maintenance or use of the vessel in question?

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The Respondent, AMERICAN MOTORISTS INSURANCE COMPANY (hereinafter AMERICAN MOTORISTS), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 681 F.2d 712.

STATEMENT OF THE CASE

The Respondent has no quarrel with the Petitioner's recitation of the facts regarding the incident which precipitated the wrongful death action against WOOTEN and AMERICAN MOTORISTS. However, the procedural aspects of this case should be clarified.

The original six count Complaint (Appendix C to the Petitioner's Brief) relied upon the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761 (hereinafter DOSHA), as a basis for relief. Although originally framed in six counts, Counts III through VI were dismissed and the action proceeded on Counts I and II. Count I sought damages based upon WOOTEN's negligence as "temporary guardian" of the deceased and Count II sought damages from WOOTEN as "captain of a sailing vessel". Subsequently, over AMERICAN MOTORISTS' objection, Count II was amended to seek "loss of society" damages under *Moragne*.

Florida law permits the joinder of an insurance company as a named party and further requires that, if any of the claims presented are covered by the policy of insurance, the insurance carrier is obligated to defend the entire action. AMERICAN MOTORISTS did so in this case, admitting coverage for the personal negligence of WOOTEN but denying coverage for damages arising out of the operation, maintenance or use of the vessel based upon the policy exclusion. The case proceeded to trial on the two aforementioned theories and, following the non-jury trial, the original Trial Court entered two Final Judgments.

The Trial Court found WOOTEN liable under Count I and found coverage under the AMERICAN MOTORISTS' homeowner's policy. Accordingly, a Final Judgment

was entered against AMERICAN MOTORISTS for "pecuniary loss" damages under DOSHA (Count I). In addition, the original Trial Court found that the vessel was unseaworthy as a result of the incompetency of the crew and further found that there was no coverage under the homeowner's policy of insurance issued by AMERICAN MOTORISTS based upon the applicability of the aforementioned exclusion. A second judgment was entered against WOOTEN for total damages which included the "pecuniary losses" under DOSHA and "loss of society" damages under the *Moragne* remedy. Both judgments have been satisfied, AMERICAN MOTORISTS paying the DOSHA damages and WOOTEN paying the "loss of society" damages.

In his first appeal, WOOTEN did *not* challanege any of the Court's findings as they related to the applicability of the *Moragne* remedy, the status of the deceased as a crew member, the unseaworthiness of the vessel or the applicability of the policy exclusion. WOOTEN did, however, seek to attack the judgment entered against AMERICAN MOTORISTS saying that it should have included the award for "loss of society" damages under *Moragne*. WOOTEN also challenged the Court's denial of his Motion for Leave to File a Cross-claim in the lower Court.

The Fifth Circuit Court of Appeals, recognizing the problems with WOOTEN's standing to appeal a judgment not entered against him, remanded the case to the Trial Court for a determination on the insurance coverage issue, recognizing that WOOTEN had not challenged any of the findings of the Trial Court.

On remand, WOOTEN added nothing to the record that would in any way affect the coverage issue and, accordingly, the Trial Court, via Summary Judgment, affirmed the finding of no coverage for damages based

on unseaworthiness (Appendix B to Petitioner's Brief). In the interim, this Honorable Court decided *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010 (1978), and held that the DOSHA was the exclusive remedy for losses occurring outside of territorial waters such as the loss involved at the case at bar.

REASONS WHY THE WRIT SHOULD BE DENIED

There are at least three reasons why the Petition should be denied.

A. The Record Does Not Raise The Question Presented In The Petition.

The sole Question Presented by the Petition is whether the *Moragne* remedy is limited to breaches of the warranty of seaworthiness or whether it is "also available" in cases involving negligence unconnected with the operation of a vessel. The Question Presented in the Petition omits reference to the fact that the death in question occurred in the Bahamas beyond the territorial waters of the United States.

From the pleading stage forward, the Plaintiff below (not a party to this appeal) proceeded on two separate and distinct theories for recovery. The original Trial Court found for the Plaintiff, holding that WOOTEN was guilty of personal negligence and also that his vessel was unseaworthy at the time of the incident in question. The award for "loss of society" (the only award in dispute) was made in conjunction with the finding of unseaworthiness. AMERICAN MOTORISTS' policy was one of homeowner's insurance excluding liability coverage for damages arising out of the operation, maintenance

or use of a watercraft and the Trial Court found that policy exclusion applicable to the damages based on unseaworthiness. On remand, WOOTEN sought review of that holding via cross-claim and, as the Eleventh Circuit Court of Appeals pointed out at 681 F.2d 713: "The issue presented by the cross-claim is one of coverage under a homeowner's insurance policy issued to Wooten by American." Thus, the issue is one of insurance coverage and resolution of the issue does not depend on what theories are "available".

It is academic whether the *Moragne* award was based on unseaworthiness or negligence since the Judge found unseaworthiness and WOOTEN has never challenged that finding. WOOTEN had argued to the Eleventh Circuit that the Judge had ruled *as a matter of law* that the general maritime law *only* permitted wrongful death actions based on unseaworthiness. In their opinion, the Eleventh Circuit pointed out that: "We question whether an issue concerning the theoretical basis for the judgment entered between Wooten and the original plaintiff is now before us." 681 F.2d at 714. WOOTEN contended that certain language used by the Trial Court indicated the Court's feeling that the general maritime recovery hinged upon the unseaworthiness of the vessel. The Eleventh Circuit went on to point out that: "The court's oral findings are susceptible to alternative interpretation—the court may have found that the *facts* of this case did not support a general maritime law recovery for wrongful death caused by negligence." 681 F.2d at 715.

Finally, WOOTEN took the position that the Trial Court's finding of negligence under Count I should be applicable to the general maritime claim. That issue was *not* decided by the Eleventh Circuit, 681 F.2d at 715, footnote 2, since to do so would be to eliminate

WOOTEN's liability under Count II without the appropriate appellate challenge.

Had WOOTEN ever challenged any of the Trial Court's findings of fact, and particularly the finding that his vessel was unseaworthy, then the question presented might be relevant. However, absent such a challenge, the finding of unseaworthiness stands and the damages awarded are properly excluded by the terms of the AMERICAN MOTORISTS Insurance Policy.

B. An Affirmative Answer To The Question Presented Would Not Change The Result Of This Case.

As previously pointed out, this is a case of insurance coverage and the vessel in question was found to have been unseaworthy giving rise to the disputed damages for "loss of society". The fact that these damages could have been awarded under a different theory is irrelevant absent of showing that the award was improperly made. Certainly, WOOTEN does not argue to this Court that the "loss of society" damages under *Moragne* could *not* have been based on unseaworthiness. Therefore, even if it were to be held that *Moragne* applies in a non-maritime context, the result in this case would be the same.

C. The Opinion By The Eleventh Circuit Court Of Appeals Is Consistent With Admiralty Jurisprudence As Announced By This Court.

The specific holding of the Eleventh Circuit Court was that: ". . . where a cause of action exists for wrongful death under DOSHA, no additional adtion exists under general maritime law for wrongful death caused by

negligence; the *Moragne* remedy applies only to unseaworthiness." 681 F.2d at 716-717.

It is respectfully submitted that this holding is consistent with *Moragne* and *Mobile Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010 (1978), and the Petition fails to disclose the existence of any case on point to the contrary. Even though the Eleventh Circuit did not rely on *Mobil Oil*, the end result is and should remain unchanged.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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